

1 **Final agency action regarding decision below:**

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3 **ALJCERT ALJ decision certified as final**

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 Ms. Paula J. Nelson,

8 Petitioner,

9 vs

10 LANDINGS HOMEOWNERS
11 ASSOCIATION,

12 Respondent.

No. 13F-H1314003-BFS

**ADMINISTRATIVE
LAW JUDGE DECISION**

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15 **HEARING:** January 31, 2014, at 8:00 a.m.

16 **APPEARANCES:** Paula J. Nelson (hereinafter “Ms. Nelson” or “Petitioner”) appeared on her own behalf. Landings Homeowners Association (hereinafter “Landings” or “the association”) was represented by its attorney, Mark Saul, Esq. Carpenter, Hazlewood, Delgado, and Bolen, PLC.

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19 **ADMINISTRATIVE LAW JUDGE:** M. Douglas

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22 Evidence and testimony were presented and the following Findings of Fact, Conclusions of Law and Recommended Order are made:

23 **FINDINGS OF FACT**

- 24
25 1. The Department of Fire, Building and Life Safety (the “Department”) is authorized by statute to receive Petitions for Hearings from members of homeowners’ associations and from homeowners’ associations in Arizona.
- 26
27 2. Landings is a homeowners’ association located in Mesa, Arizona.
- 28
29 3. Ms. Nelson owns a residence in and is a member of Landings.
- 30
4. Petitioner filed a petition with the Department alleging that Landings had violated the provisions of A.R.S. § 33-1805(A). Petitioner specifically alleged that Landings

1 violated the provisions of A.R.S. § 33-1805(A) by failing to provide her with copies of
2 various association records that she had requested within ten days of her request.

3 5. Landings' Answer to the Petition stated, in relevant part, as follows:

4 Petitioner sent the Association a voluminous and broad
5 records request on or about April 12, 2013 and demanded that the
6 Association send her copies of records via email. The
7 Association's community manager, Jo Seashols, responded to
8 Ms. Nelson's letter on April 22, 2013, notifying Ms. Nelson that
9 she could visit the management company's office to review the
10 records requested. In response to repeated correspondence from
11 Ms. Nelson, the Association reminded Ms. Nelson again on May
12 2, 2013 that she could set up an appointment to review the
13 Association's records at the management company's office. Ms.
14 Nelson also made a least two other requests for additional
15 documents between April 24, 2013 and July 18, 2013.

16 The Association's correspondence and scheduled meeting
17 satisfies the requirements of A.R.S. § 33-1805(A), as the
18 Association made the documents requested by Ms. Nelson
19 "reasonably available for inspection" within 10 business days of
20 her request. A.R.S. § 33-1805(A) does not require that a planned
21 community email documents or provide documents in a certain
22 format chosen by the member. Instead, a planned community
23 must simply make its records "reasonably available for
24 examination."

25 **Testimony of Robyn McRae**

26 6. Robyn McRae (hereinafter "Ms. McRae") testified that she drove Petitioner to the
27 Landings' management company to pick up copies of documents prepared by
28 Landings. Ms. McRae stated that she counted the pages in the documents. Ms.
29 McRae testified that Petitioner had a list of the documents that she wanted. Ms.
30 McRae stated that three or four of the requested documents "were not there." Ms.
McRae testified that the lady at the management company that was assisting them
indicated that the missing documents would be provided in another ten days.

7. Ms. McRae testified that Petitioner requested some photographs that were not
produced. Ms. McRae stated that the lady assisting them said that "Renee" had the
photographs or the files with the photographs. Ms. McRae testified that the
management company informed Petitioner that the documents that Petitioner was

1 requesting were not available and that it would be another ten days before the
2 documents could be produced.

3 8. Ms. McRae acknowledged that Landings' management company represented
4 that it had produced all of the requested documents that were available at that time.

5 **Testimony of Robert William Timmons**

6 9. Robert William Timmons (hereinafter "Mr. Timmons") testified that he was the
7 representative for Sprayfoam Southwest Inc. (hereinafter "Sprayfoam"). Mr. Timmons
8 stated that Sprayfoam was selected by the Landings to perform the roofing
9 replacement work at the association. Mr. Timmons testified that he worked closely
10 with Tom Minor.

11 10. Mr. Timmons testified that over fifty percent of the roofing in the association
12 needed to be removed and replaced. Mr. Timmons stated that he had to convince Mr.
13 Minor that the photos of the individual roofs were getting redundant. Mr. Timmons
14 testified that all of the roofing in the association was torn off and replaced.

15 11. Mr. Timmons testified that the contracts were signed after Mr. Minor was "out of
16 the picture." Mr. Timmons stated that the association hired an alternative roof
17 inspection entity to monitor Sprayfoam's construction work after Mr. Minor left. Mr.
18 Timmons stated that he was surprised that Petitioner subpoenaed him to appear at the
19 hearing.

20 12. Mr. Timmons testified that "he had no idea" if the association had Sprayfoam's
21 records regarding the roofing project. Mr. Timmons stated that hundreds of
22 photographs were taken of the association's roofs. Mr. Timmons testified that he did
23 not know if the photographs were given to the association.

24 13. Mr. Timmons testified that the assessment report that was given to the
25 association on September 20, 2011, contained a condensed version of the construction
26 project with a limited number of photos. Mr. Timmons stated that his communications
27 were directly with the board of directors for the association. Mr. Timmons testified that
28 he did not have any dealings with the association's management company.

29 14. Mr. Timmons acknowledged that a disc containing photographs of some of the
30 roofs on the individual units in Landings was transmitted to the association. Mr.

1 Timmons stated that he did not remember when the disc was transmitted.

2 15. Mr. Timmons testified that he “worked hand in hand” with Mr. Minor while Mr.
3 Minor was representing the association on the construction project. Mr. Timmons
4 stated that there were no reports containing a unit-by-unit roofing assessment. Mr.
5 Timmons testified that he was able to convince Mr. Minor that all of the roofs in the
6 association required removal and replacement.

7 16. Mr. Timmons testified that many records for the construction project had been
8 transmitted to Mr. Minor. Mr. Timmons stated that he had not seen the records that
9 were transmitted to Mr. Minor since Mr. Minor “disappeared.” Mr. Timmons provided
10 Petitioner and Landings with copies of all of Sprayfoam’s records for the construction
11 project.

12 17. Mr. Timmon’s testimony is found to be credible.

13 **Testimony of Paula J. Nelson**

14 18. Ms. Nelson testified that prior to her April 12, 2013 request for documents, the
15 association’s management company transmitted all requested records to her via email.
16 Ms. Nelson stated that the association’s management company refused to comply with
17 her April 12, 2013 request via email. Ms. Nelson testified that she renewed her request
18 on April 24, 2013, and July 20, 2013. Ms. Nelson stated that she did not ask to review
19 the records. Ms. Nelson testified that she asked that she be provided with copies of the
20 requested records.

21 19. Ms. Nelson testified that the association refused to provide the requested copies
22 unless and until Ms. Nelson reviewed the documents in the management company’s
23 office. Ms. Nelson stated that she had an appointment to pick up copies of the
24 requested documents on July 25, 2013. Ms. Nelson testified that she was unable to
25 keep her appointment because of her health. Ms. Nelson stated that she moved the
26 appointment to July 30, 2013.

27 20. Ms. Nelson testified that she reviewed the documents and determined that
28 several documents were missing. Ms. Nelson stated she was informed that any copies
29 that were not ready on July 30, 2013, would be ready in ten days. Ms. Nelson testified
30 that the management company’s representative informed her that the management

1 company representative had contacted the association and had been informed that the
2 photos and assessments of the individual roofs for the association were in the
3 possession of an individual who had previously been a member of the board.

4 21. Ms. Nelson testified that the requested documents were sent to her sporadically.
5 Ms. Nelson reviewed the items on her request that had been fulfilled by the association.
6 Ms. Nelson stated that the complete vendor history for "Pinnacle Restoration" had not
7 been given to her. Ms. Nelson acknowledged that the association had provided the
8 requested vendor history at a later date.

9 22. Ms. Nelson acknowledged that most the information that she requested from the
10 association had been provided to her. Ms. Nelson asserted that much of the
11 information was provided to her after the ten-day period provided by statute had
12 elapsed.

13 23. Ms. Nelson testified that the photographs and assessments of the individual roofs
14 for the units in the association were not given to her. Ms. Nelson stated that she knew
15 that the association had the requested photographs and assessments in the
16 association's possession because she had proof that the association had paid Mr.
17 Minor to create binders and spreadsheets with the photographs and individual roof
18 assessments. Ms. Nelson testified that she had documentation that the association
19 had paid for the preparation of the binders. Ms. Nelson stated that she obtained the
20 documentation for the binders and spreadsheets with photographs and individual roof
21 assessments from the association. Ms. Nelson testified that she believed that the
22 binders and spreadsheets with the photographs and individual roof assessments were
23 in the possession of the association and that the association had refused to deliver the
24 requested documents to her.

25 24. Ms. Nelson testified that the association denied that the binders and
26 spreadsheets had ever been created. Ms. Nelson stated that she wanted the
27 association to furnish her with Mr. Minor's binders, spreadsheets, all photographs of the
28 roof on her residence, and the comprehensive roofing assessment that was performed
29 for the roof of her residence. Ms. Nelson testified that the association had also
30 withheld correspondence with the association's attorney from her.

1 25. Ms. Nelson acknowledged that she had received correspondence from the
2 association's attorney that the requested roofing binders were in the attorney's
3 possession and available for the Complainant's review but that the roofing binders did
4 not contain photographs and a comprehensive assessment of Petitioner's roof and that
5 the information in the roofing binders was not broken down into roofing assessments
6 for the individual housing units in the association.¹

7 26. Ms. Nelson acknowledged that she had received the correspondence from the
8 association's attorney informing her that she could schedule a time to review Mr.
9 Minor's roofing binders. Ms. Nelson acknowledged that she had not scheduled a time
10 with the association's attorney's office to review the requested roofing binders. Ms.
11 Nelson acknowledged that she had never reviewed Mr. Minor's roofing binders in the
12 association's attorney's possession.

13 27. Ms. Nelson acknowledged that the association would not be able to produce
14 something that it did not actually possess. Ms. Nelson testified that she believed that
15 the association did possess Mr. Miner's binders that she was requesting. Ms. Nelson
16 stated that the binders in the association's attorney's possession were not the same
17 roofing binders that the association had paid Mr. Minor to create.

18 **PROVISIONS OF LAW REFERENCED AT HEARING**

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21 1. A.R.S. § 33-1805(A) provides as follows:

22 A. Except as provided in subsection B of this section, all financial
23 and other records of the association shall be made reasonably
24 available for examination by any member or any person
25 designated by the member in writing as the member's
26 representative. The association shall not charge a member or any
27 person designated by the member in writing for making material
28 available for review. The association shall have ten business days
29 to fulfill a request for examination. On request for purchase of
30 copies of records by any member or any person designated by the
member in writing as the member's representative, the association
shall have ten business days to provide copies of the requested

¹ See Exhibit R-2 (10/2/13 through 11/06/13 Email chain).

1 records. An association may charge a fee for making copies of not
2 more than fifteen cents per page.

3 B. Books and records kept by or on behalf of the association and
4 the board may be withheld from disclosure to the extent that the
5 portion withheld relates to any of the following:

6 1. Privileged communication between an attorney for the
7 association and the association.

8 2. Pending litigation.

9 3. Meeting minutes or other records of a session of a board
10 meeting that is not required to be open to all members pursuant to
11 section 33-1804.

12 4. Personal, health or financial records of an individual member of
13 the association, an individual employee of the association or an
14 individual employee of a contractor for the association, including
15 records of the association directly related to the personal, health
16 or financial information about an individual member of the
17 association, an individual employee of the association or an
18 individual employee of a contractor for the association.

19 5. Records relating to the job performance of, compensation of,
20 health records of or specific complaints against an individual
21 employee of the association or an individual employee of a
22 contractor of the association who works under the direction of the
23 association.

24 C. The association shall not be required to disclose financial and
25 other records of the association if disclosure would violate any
26 state or federal law.

27 **CONCLUSIONS OF LAW**

28 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization to
29 file a petition with the Department for a hearing concerning violations of planned
30 community documents or violations of statutes that regulate planned communities. That
statute provides that such petitions will be heard before the Office of Administrative
Hearings.

1 2. The burden of proof at an administrative hearing falls to the party asserting a
2 claim, right, or entitlement and the standard of proof on all issue in this matter is by a
3 preponderance of the evidence. See A.A.C. R2-19-119.

4 3. Proof by “preponderance of the evidence” means that it is sufficient to persuade
5 the finder of fact that the proposition is “more likely true than not.” *In re Arnold and*
6 *Baker Farms*, 177 B.R. 648, 654 (9th Cir. BAP (Ariz.) 1994).

7 4. Ms. Nelson asserts that the association has refused to provide her with Mr.
8 Minor’s binders with an individual assessment and photographs of the roofing that was
9 on her residence in 2011. Ms. Nelson acknowledged that she had not scheduled an
10 appointment with the association’s attorney to review the requested roofing binders in
11 the attorney’s possession. Ms. Nelson acknowledged that she had never reviewed Mr.
12 Minor’s roofing binders that were proffered to her. The fact that the association may
13 have paid Mr. Minor to create binders with photographs and individual assessments of
14 the roofs for the individual units in the association does not establish that such binders
15 were created by Mr. Minor and delivered to the association. There was no credible
16 evidence that the association possessed any of Mr. Minor’s binders other than the
17 binders that the association offered to let Petitioner review.

18 5. The association is not required to provide the Petitioner with privileged
19 communication between an attorney for the association and the association.

20 6. Petitioner made repeated and expanded requests in an attempt to obtain
21 information regarding the individual assessment and photographs of her roof and other
22 individual roofs in the association. Based on the testimony and evidence presented, this
23 Tribunal concludes that the association complied with Petitioner’s requests for documents
24 in a reasonable manner.

25 7. Petitioner failed to satisfy her burden of proving by a preponderance of the
26 evidence that the association violated the charged provision of A.R.S. § 33-1805(A).

27 **RECOMMENDED ORDER**

1 In view of the foregoing, it is ORDERED that Landings be deemed the prevailing
2 party in this matter.

3 It is further ORDERED that this Petition be dismissed.

4 *In the event of certification of the Administrative Law Judge Decision by the*
5 *Director of the Office of Administrative Hearings, the effective date of this Order will*
6 *be five (5) days from the date of that certification.*

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8 Done this day, February 14, 2014.

9 /s/ M. Douglas
10 Administrative Law Judge

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12 Transmitted electronically to:

13
14 Gene Palma, Director
15 Department of Fire Building and Life Safety
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